

MINUTES

MONTANA SENATE 56th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on January 22, 1999 at 9:00 A.M., in Room 108 Capitol.

ROLL CALL

Members Present:

Sen. Lorents Grosfield, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Duane Grimes (R)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Walter McNutt (R)

Members Excused: None.

Members Absent: None.

Staff Present: Judy Keintz, Committee Secretary
Valencia Lane, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: None
Executive Action: SB 128, SB 155, SB 66, SB 186,
SB 185, SB 213

EXECUTIVE ACTION ON SB 128

Motion: SEN. HALLIGAN MOVED SB 128 DO PASS.

Discussion:

SEN. HALLIGAN stated that the license fee needs to be permanent.

Ms. Lane stated that if the licensing fee is to continue, it must be put on the ballot. Amendments would be needed to strike everything after the enacting clause. It would have nothing but a submission to the electorate on the vote on whether or not to continue those fees. There would also be a sunset and a void contingency provisions would be included that if CI-75 was void, then the submission to the electorate would be void. She added that the **Beth O'Halleran, State Auditor's Office**, asked that this not be amended because they can absorb the fees if necessary. It would not be worth \$30,000 to place this on the ballot for fees that would bring in \$23,000.

SEN. BARTLETT referred to the fiscal note **EXHIBIT(jus17a01)** and remarked that the assumptions stated that the fees would produce \$1,500 and that there will be fines for violations that produce \$15,000. The fines would stay in the bill.

Vote: The motion to amend SB 128 carried unanimously, 9-0.

EXECUTIVE ACTION ON SB 155

Ms. Lane explained that amendment SB015504.av1 **EXHIBIT(jus17a02)** is a substitute bill. Everything after the first clause in the title would be stricken. Amendment 2 strikes sections 1-4 of the bill in their entirety and substitutes the new section 1. This would leave the first clause in the title, the new section 1, and the immediate effective date. This makes an affirmative statement that the responsibility of the broker or salesperson with respect to sexual or violent offender registration information is limited to disclosure of the fact that the information may be maintained and by whom. They must disclose actual knowledge if they have any that pertains to the property in question. This new section would be codified in Title 37, Chapter 51, Part 1.

CHAIRMAN GROSFIELD remarked that current law is vague. The amendment should help the situation.

Zane Sullivan, Montana Realtors Association, maintained that the amendment is a significant improvement over the proposed language and deals with the issue that the real estate licensees are concerned about in a much more summary fashion than the original proposal. They would be left with an adverse material fact definition immediately following this definition and the two seem to be slightly inconsistent. The amendment does not address subsection (10) page 7 of the original proposal which pointed out an inconsistency between adverse material facts and pertinent facts. Adverse material facts and pertinent facts may be two different things.

Ms. Lane clarified that this is designed to be a new MCA section in Title 37, Chapter 51, part 1 and not in the definitional section which is §37-51-102.

Motion/Vote: SEN. MCNUTT MOVED TO AMEND SB 155. The motion carried unanimously, 9-0.

Motion/Vote: SEN. HALLIGAN MOVED SB 155 DO PASS AS AMENDED. The motion carried unanimously, 9-0.

EXECUTIVE ACTION ON SB 185

SEN. HALLIGAN remarked that if the bill was tabled there is still plenty of time before transmittal to clean up the bill a little and accomplish something with respect to disclosure requirements instead of prohibiting sweepstakes altogether.

Motion: SEN. HALLIGAN MOVED TO TABLE SB 185.

Discussion:

SEN. MCNUTT agreed. He added that the bill is simply too far reaching.

SEN. BARTLETT stated that this is not as innocent as it appears and deserves attention. The people who run the sweepstakes do not make the conditions and terms at all clear to the people who participate in this.

CHAIRMAN GROSFIELD agreed that sweepstakes are not altogether innocent. He was concerned with the narrow title. He suggested that **SEN. CHRISTIAENS** be advised of the Committee's concerns and that it could be considered later.

Vote: The motion to table SB 185 carried unanimously, 9-0.

EXECUTIVE ACTION ON SB 186

Ms. Lane explained that the amendments SB018601.av1 **EXHIBIT(jus17a03)** were requested at the hearing by **Jim Smith, Sheriff and Police Officers Assoc.** They provide a penalty if the person refuses to take the breath test that can be requested under the existing bill, subsection 2. It would provide for revocation of the permit for a time not to exceed four years.

Bud Elwell, Weapons Collector Society and Montana Northwest Arms Collectors, responded that the original intent of this was for restaurants and casinos where alcohol was served. This was not

meant for bars. The **Sheriff's and Police Officers Association** believed this would be too hard to enforce and proposed to widen this and include implied consent. He didn't see any problem with the amendment.

SEN. BARTLETT remarked that revocation of the license for a period of four years seemed excessive to her.

{Tape : 1; Side : A; Approx. Time Counter : 9.30}

Mr. Smith replied that the permit is in force for a four year period. If the permit was to be revoked, it seemed reasonable that it be for an identical period.

SEN. HOLDEN maintained that a four-year revocation was too long for refusing a breath test.

Motion: SEN. HOLDEN MOVED TO AMEND SB 186.

SEN. HOLDEN explained that he would change amendment SB018601.avl to state one year instead of four years.

SEN. JABS remarked that the language stated up to four years. The judge could use his discretion depending on the circumstances.

Ms. Lane suggested the amendment be changes to state "for a period of time not to exceed one year or the remainder of the permit period whichever is less."

The Committee members agreed.

CHAIRMAN GROSFIELD clarified that 45-8-321 stated "This privilege may not be denied an applicant unless . . . (f) has been adjudicated in a criminal or civil proceeding in any state or federal court to be an unlawful user of an intoxicating substance or is under a court order of imprisonment or other incarceration."

Vote: The motion to amend carried with SENATORS JABS and HALLIGAN voting "no" - 6-2.

SEN. HALLIGAN asked for clarification regarding carrying a concealed weapon in a public building.

Dal Smilie, Department of Administration, stated that it would be okay to carry a concealed weapon in public buildings. Another statute allows local government to make some restrictions.

SEN. HALLIGAN added that state buildings would not be covered.

SEN. GRIMES asked about an incident in Bozeman where someone carried a shotgun into a state building. He questioned how this would affect the state's liability. **Mr. Smilie** stated that in Bozeman a student brought a shotgun into a state building and killed two students. This would allow employees, visitors, contractors, and others to carry weapons into a state building and the state would gain the liability.

SEN. HOLDEN commented that the National Rifle Association testified that Montana is the only state that had this restriction. People who have concealed weapon permits are not the problems and provide self defense for the citizenry under certain circumstances.

John Connor, Attorney General's Office, stated that their biggest concern is people showing up with guns in places where they have evidence of crimes stored such as the State Crime Lab. This would include courthouses and other public buildings where they conduct business during the course of a trial when there is a lot of volatility involved.

Mr. Smilie clarified that the administration has a policy for visitors in buildings. He added that approximately one-third of workplace deaths throughout the country caused by violence involve employees shooting each other. He agreed that concealed weapon permittees were a law abiding group. The state has certain people they want to carry firearms and they receive a significant amount of training because the state has a large liability. They are very concerned about their untrained employees such as property appraisers, welfare workers, etc.

{Tape : 1; Side : B; Approx. Time Counter : 9.50}

SEN. HALLIGAN questioned whether the interested parties could come to a consensus on this issue. **Mr. Smith** stated that they worked on this issue until the session began and did not beat the clock in terms of a better resolution of this particular issue. Guns are not allowed in federal buildings. If the state wanted to pass similar legislation, it is free to do so. Municipalities are also authorized to do so under another statute. The problem is that this creates different local ordinances in different communities around the state and the responsibility is on the permit holder to know those local ordinances. He added that he is not aware of a documented case where someone with a concealed weapon intervened and prevented a crime or successfully defended an unarmed citizen. This is often cited as a valuable argument for this type of legislation but he is not aware that this sort of intervention has successfully happened.

SEN. HOLDEN disagreed. He added that the NRA monthly publication outlines situations where concealed weapons were used to stop a rape from occurring, to stop car hijacking, etc.

SEN. BISHOP stated that when a citizen carrying a concealed weapon attempts to use it on a criminal, more often than not the citizen is shot with his own firearm.

SEN. BARTLETT maintained that the section of law (45-8-351) that authorizes local governments to place restrictions on where concealed weapons can be carried is limited to publicly owned buildings. There was concern expressed by various witness, including the Department of Justice, about losing that authority for leased buildings. The state leases a lot of space.

CHAIRMAN GROSFIELD referred to an amendment suggested by **Mr. Smilie, EXHIBIT (jus17a04)**. He added that the amendment would require a two-thirds vote.

He further remarked that this bill only addresses alcohol and does not address the use of drugs.

SEN. MCNUTT raised a concern about every local area having its own ordinance. **CHAIRMAN GROSFIELD** replied that this could be compared to a hunting license. Each area has different boundaries and rules. The hunter has the responsibility to know the different circumstances. The concealed weapon permit holder would have the responsibility to know the local ordinance.

Mr. Elwell stated that there was confusion when the state government leased one office in a privately owned building. Would this be a state building? He added that intoxicating substances were added to the bill and would include drugs.

CHAIRMAN GROSFIELD stated that line 18 addressed an intoxicating substance. Later on in the bill, line 23 only addressed alcohol and there is no mention made of any other intoxicating substance. He questioned whether drugs would be covered under this bill.

Mr. Connor stated that the term "intoxicating substances" would deal with drugs. However, this seems to be inconsistent with line 23 which addresses concentration of alcohol. Since this is the case intoxicating substances may be construed to include only alcohol.

Ms. Lane stated that there is an ambiguity in the body of the bill where intoxicating substances is mentioned and later on alcohol is used. The question remains as to what was intended.

The title addresses alcohol. She added that this drafting inconsistency needed to be addressed.

CHAIRMAN GROSFIELD summarized that there were no motions on the bill. There are questions regarding both the drug issue and public building issue.

Motion: SEN. MCNUTT MOVED TO TABLE SB 186.

Discussion:

SEN. MCNUTT suggested that the interested parties try to come up with a compromise on the outstanding issues.

SEN. BARTLETT added that during the testimony **Beth Baker, Department of Justice**, indicated that section 1 needed to track with the DUI laws for breath tests. **Alec Hanson, League of Cities and Towns**, also brought up the point that municipalities and towns would need to be sure that they had the legal authority necessary to enforce this provision.

CHAIRMAN GROSFIELD asked if a breathalyzer would show a .04. **Jim Hutchinson, Montana Crime Lab**, explained that current technology available to law enforcement will measure .04.

Substitute Motion/Vote: SEN. BISHOP MOVED SB 186 DO NOT PASS.
The motion failed 2-7.

Vote: The motion to table SB 186 carried, 9-0.

EXECUTIVE ACTION ON SB 66

Motion: SEN. HALLIGAN moved that SB66 DO PASS.

Discussion:

SEN. HALLIGAN remarked that this involves basic civil rights. No one will get special attention. It will allow a tool to protect people from malicious and vicious harassment. The message needs to be positive.

SEN. GRIMES commented that he is not convinced that this isn't a step towards special rights. We are all created equal in the eyes of God. After the hearing, his children were home and a message was left on his answering machine that stated that his children may be homosexual and his friends children may be homosexual. He maintained that he has a right to believe homosexuality is a choice. This takes a step in the direction of

allowing all the constituents he represents to have their children subjected to this same thinking. This has nothing to do with who we allow to intimidate or harass someone else. None of that is acceptable. There is a larger issue going on here and he respectfully disagreed with **SEN. HALLIGAN**.

CHAIRMAN GROSFIELD stated that the language on line 14 stated terrify, intimidate, threaten, harass, annoy or offend.

SEN. GRIMES stated that he was not alleging that this was intimidation or harassment. He would not have called their home and left a message saying this is a choice and this is what the Bible says about your choice.

SEN. DOHERTY remarked that legislators should not be subject to that type of activity. He pointed out that statements needed to be tied to actions under the hate crimes statute. It is entirely appropriate to add an additional vulnerable group that has been targeted in our society because they are different. As a matter of law this seems to be entirely appropriate when dealing with the malicious harassment statute. There is a U.S. Supreme Court case that deals specifically with a Wisconsin statute that is very similar to the current statute in which it found that the Wisconsin statute was constitutional. The problem with defining certain conduct as being criminal, it is necessary to be specific. If this is vague, the statute will be struck down because the notion is that citizens need to be given fair warning of what is prohibitive conduct.

The Texas statute is similar to SB 213. He spoke to State Senator Rodney Ellis who told him that he is embarrassed that he is the author of the Texas statute. The Texas statute is not being used by prosecutors because they believe that their cases will be thrown out in court and that he has attempted every session since its original passage to amend the statute to be similar to the Wisconsin statute which has passed Constitutional muster.

The Montana Association of Churches stated that this bill will not infringe on the free exercise of religion. This bill has also been endorsed by the Governor, the Attorney General, the Montana County Attorneys Association, and the Sheriff's and Peace Officers Association.

SEN. HOLDEN remarked that this bill is completely political. Last summer he started to receive letters and information from the Human Rights Network and others around the state who have been pushing the gay/lesbian agenda in this state since he became a legislator in 1995. Proponents claimed that the actions in the area of bodily injury needed to be real actions. They mentioned

property damage and injury to a person's body. Attorney General Mazurek conceded that the definition of bodily injury can mean mental anguish. This is what sexual orientation really is. Sexual preference has been changed to sexual orientation. This change is brought under the belief that one is born that way. As a mainstream, lifelong Lutheran sexual orientation is not something that you are born with and would be a sin under the Bible. This sin is exemplified in biblical writings 9,000 years old. This legislation goes at the core beliefs of Judea Christian beliefs in our society and certainly mainstream Montana will not settle for erosion of religious and cultural beliefs in this area of gay/lesbian political agenda. He will strongly vote against this legislation and any legislation which would ever serve to promote and expand the gay/lesbian political agenda in this state. He added that he does this by faith.

SEN. MCNUTT believes this is a special group. If we address this issue, we need to do so for every citizen in the state equally and make a public policy statement.

{Tape : 1; Side : B; Approx. Time Counter : 10.43}

SEN. BARTLETT asked what impact this legislation may have on the Department of Corrections. **Mary Craigle, Department of Corrections**, stated that there were two offenders sentenced under this subsection as an enhancement. Both of those offenders received three years suspended sentences. The additional language in the statute will enhance the use of the statute since it widens the net. Most of these cases are brought through the assault statutes.

SEN. BARTLETT stated that **SEN. HOLDEN'S** remarks indicate that we should be reflecting a particular set of religious beliefs in the laws that are written in this state. While that may be the prevailing religion in the state, the freedom of religion portions of our State and Federal Constitutions indicate that we cannot base our laws on a set of religious beliefs. She is disturbed whenever the legislature takes action that enables a set of people to be targeted and refuse to extend the full protection of the law to a specific set of people. If we choose to reject this bill, that is what we will be saying. We will be saying that a group of individuals who are identifiable and have a different lifestyle than we might choose, it is okay if they are targeted for harassment, intimidation, bodily injury, or damage to their property. We need to make it clear that those kinds of actions simply are not tolerated. That is what this statute will do.

SEN. GRIMES maintained that there is no attempt to deny this group of individuals any rights that we all possess. It is his opinion that they want to deny us the beliefs and opinions that we have. His opposition to this bill does not indicate in any way condolence for any violence that is taken against any human. He does not want to put one group above another based on what he believes to be a behavior.

Substitute Motion: **SEN. GRIMES** moved that **SB 66 BE TABLED.**

Discussion:

CHAIRMAN GROSFIELD questioned how many prosecutions there were under 221 and 222 since their enactment. **Mr. Connor** explained that there were two cases that were appealed before the Supreme Court. He was not sure how many had been prosecuted in the district court because those figures are not maintained.

CHAIRMAN GROSFIELD remarked that violent sexual offenders is an issue that has been dealt with across this country. We do not have any kind of effective treatment for serious sexual offenders. We have a statute that states serious sexual offenders must register for life. One of the classes of people that this goes to are the people who sexually assault children. Society has decided that these people are incurable. When addressing sexual orientation, this would include a pedophile whose sexual orientation is children.

SEN. BISHOP remarked that there is already a laundry list. He questioned why the brakes were being put on just before sexual orientation.

Vote: Motion **carried 5-4.**

EXECUTIVE ACTION ON SB 213

Motion: **SEN. HALLIGAN** moved that **SB 213 BE TABLED.**

Discussion:

CHAIRMAN GROSFIELD remarked that amendments had been prepared which addressed a wide variety of the concerns raised in committee.

SEN. HALLIGAN withdrew the motion as a courtesy to the Chairman.

{Tape : 1; Side : B; Approx. Time Counter : 11:00}

Motion: **SEN. HOLDEN MOVED TO AMEND SB 213 - LC77,**
 EXHIBIT(jus17a05)

Discussion:

CHAIRMAN GROSFIELD explained that the amendments expanded the list to include dignity and status. This applies both with respect to a person or any property involved in the crime. Instead of stating "of the victim" the wording has been changed to "of any person". The reason for the change is that the current hate crime statute would not protect someone who was walking down the street with a homosexual friend and was later attacked because he was a gay lover. The most significant changes are in the definition subsection(2). The first term is "defaced" because defaced property has been added. The next term is "dignity" which goes to Article II, section 4 of the Montana Constitution which states: "Section 4. INDIVIDUAL DIGNITY. The dignity of the human being is inviolable. No person shall be denied the equal protection of the law, nor be discriminated against in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas, . . ." He added that this contains several items that are not on the list in the current hate crime statute. These items include sex, culture, social origin or condition, or political or religious ideals.

CHAIRMAN GROSFIELD added that the minutes from the Montana Constitutional Convention stated, "The committee felt that this proposal incorporated all the features of all the delegate proposals on the subjects of equal protection of the laws and the freedom from discrimination. The committee is well aware that any broad proposals on these subjects would require considerable statutory embellishment. It is hoped that the legislature will enact statutes to promote effective eradication of the discriminations prohibited by this section. The considerable support for and lack of opposition to this provision indicates its import and advisability." **EXHIBIT(jus17a06)**

Referring to the proposed amendments, he added that "position" means social, community, or professional position. "Status" means lifestyle, character, reputation, or physical or mental appearance or condition.

SEN. GRIMES questioned the word "intentionally" in the amendments. He suggested using the words "purposely or knowingly". **CHAIRMAN GROSFIELD** responded that the word "intentionally" came from the Wisconsin statute.

Mr. Connor remarked that "intentionally" may work for Wisconsin statutes but Montana is not a specific intent state so we use the mental states of purposely or knowingly in §45-2-101. This would be more consistent since "intentionally" is not defined in the code.

Motion: SEN. HOLDEN MOVED TO AMEND THE EARLIER MOTION TO ADD THE WORDS "PURPOSELY AND KNOWINGLY" WHERE APPROPRIATE.

SEN. DOHERTY questioned whether there was enough definition in the Wisconsin statute to meet the question about position or status. He questioned what was meant by "dignity" in the minutes to the Montana Constitutional Convention. The words "dignity" and "culture, social origin or condition" are very broad terms. The framers of the Constitution hoped that the legislature would enact appropriate statutory laws in order to bring life to the broader concepts.

CHAIRMAN GROSFIELD noted that page 628 of the minutes from the Montana Constitutional Convention goes into detail on each of these. It states that considerable testimony was heard concerning the need to include sex in any equal protection. They saw no reason for the state to wait for adoption of the federal Equal Rights Amendment. The word culture was incorporated specifically to cover groups whose cultural base is distinct from mainstream Montana, especially the American Indians. Social origin or condition was included to cover discriminations based on status of income and standard of living. It also addresses political and religious ideas as well.

SEN. HALLIGAN questioned whether notice was necessary for enhanced penalties. **Mr. Connor** stated that they do give notice.

SEN. HALLIGAN remarked that under this bill, there would be a potential six month addition to the sentence. **Mr. Connor** believed it could be more than that. It states that the court shall impose many of the restrictions or conditions on the sentence that are provided in 46-18-202(1) and (2). Subsection (1) relates to the denial of certain enumerated civil rights. Subsection (2) is the no parole restriction. If a person committed an aggravated assault under conditions that would fit within the terms of the amended act, the court would have the option to impose a sentence up to the maximum 20 years and no parole. The six month addition could also apply.

SEN. BARTLETT stated that the sentence enhancement would only apply if the court imposes less than the maximum sentence for the underlying crime. If the maximum sentence for assault is 20

years and the perpetrator intentionally selected a victim for one of these reasons there would be no sentence enhancement.

CHAIRMAN GROSFIELD replied that in the Billings case where three men attacked a mentally ill person, all three were charged with aggravated assault. One person's sentence was 20 years which was the maximum and he could not have anything added to his sentence. If the judge wants to make a statement about the fact that the person attacked someone who is mentally ill, he might give him five years for aggravated assault and 15 years under sentence enhancement. The sentence enhancement is very broad. The value of anti-discrimination laws is to make an impression upon society in minor offenses.

SEN. BARTLETT stated that this statute would only add an additional six months to a maximum statute. **CHAIRMAN GROSFIELD** remarked that the only way to add onto the sentence is to make up an additional crime.

Mr. Connor commented that if the crime was felony criminal mischief which has a maximum of 10 years, the court could sentence the person to nine years and say that the crime was committed because of the person's status and give an additional six months. If the court gave the person 10 years, the six months could not be added. He would have to propose the no parole restriction.

SEN. DOHERTY remarked that if someone knowingly and purposefully chooses a victim because of their perceived dignity what would that mean. Would this mean to offend their dignity, diminish their dignity or because of their dignity? He agreed that the message needed to go out on the smaller crimes because a capital offense cannot be enhanced. He further remarked that in the instance of a person in a bar stating that he hated gays and would like to beat up a gay if he could find one. He later ends up beating up a gay person and during the commission of the crime states that he would not be beating him up if he were not gay. Would a prosecutor be able to prosecute for beating up a gay individual?

CHAIRMAN GROSFIELD remarked that the prosecutor could refer to this statute. **Mr. Connor** added that the prosecutor has to prove the circumstances that would allow the court to impose them.

CHAIRMAN GROSFIELD questioned whether the court could find that the offender intentionally selected the victim under this statute without the prosecutor's involvement. **Mr. Connor** stated that the court ordinarily would not do so unless the state makes an affirmative presentation of proof.

SEN. DOHERTY questioned whether a prosecutor could seek a sentence enhancement because the victim was gay. **CHAIRMAN GROSFIELD** stated that the prosecution could do so.

SEN. DOHERTY remarked that by voting for these amendments he would be furthering or advocating the homosexual agenda.

CHAIRMAN GROSFIELD added that bigotry goes way beyond homosexuals, pedophiles, or mentally ill persons.

SEN. DOHERTY stated it was his understanding that the term "lifestyle" would include a gay or a lesbian individual.

CHAIRMAN GROSFIELD affirmed that it would.

SEN. BARTLETT stated that if this bill were to pass, it would repeal the two sections of the code dealing with malicious intimidation or harassment relating to civil or human rights and the sentence enhancement for offenses committed for those reasons. If this statute were struck down by the court because of vagueness, this would leave no statute that would specifically address targeting a victim because of some characteristic.

CHAIRMAN GROSFIELD remarked that the bill did not have a severability clause. He questioned what would happen in the case of a repealer. **Ms. Lane** stated that severability would not help. Once a law is taken off the books, it is gone.

SEN. DOHERTY applauded the effort but added that he is very concerned about repealing the specific language which already has been held constitutional by our Supreme Court which provides greater protections to individuals than does the United States Supreme Court.

SEN. MCNUTT remarked that this bill addresses the issue that is of compelling interest to all citizens of Montana.

CHAIRMAN GROSFIELD stated that the language will cover the things that need to be covered. The intention is to expand the statute to make the net a little broader. This goes to implementing things that the delegates to the Constitutional Convention said ought to be implemented.

SEN. HALLIGAN maintained that there was a tremendous risk with this bill because it repeals the existing malicious intimidation harassment laws that deal with race, creed, religion, color, and national origin. This is a tremendous risk and needs to be part of the decision on whether we go forward with this. The language is relatively vague which has not been tested in the courts. He believed this would send a negative message with respect to the

protection of those groups that may target for those characteristics.

SEN. BARTLETT stated she was intrigued by the approach but would vote against the amendments because this is more of a risk than she is willing to take. She is especially concerned about losing any portion of the criminal code addressing these kinds of situations.

SEN. HOLDEN stated that there was no risk. If the court puts this down, the legislature can address this next session. Society does not crumble between sessions. This amendment treats all people equally.

Vote: The motion carried on roll call vote 5-4.

CHAIRMAN GROSFIELD stated that the bill as amended would be taken up for executive action on Monday.

EXECUTIVE ACTION ON SB 165

Motion/Vote: **SEN. MCNUTT MOVED THAT THE COMMITTEE RECONSIDER ITS ACTION ON SB 165. The motion carried unanimously.**

CHAIRMAN GROSFIELD explained that the committee had left discretion on drafting the amendment and this needs to be further discussed.

DISCUSSION ON POTENTIAL COMMITTEE BILL

CHAIRMAN GROSFIELD remarked that the Committee is looking at a Committee Bill regarding ingestion of any amount of drugs being a form of criminal possession.

SEN. BARTLETT explained that the current statute carries a mandatory minimum two year sentence for criminal possession of opiates. The bill that deals with precursors to drugs has mandatory minimums. The concern is that a mandatory minimum for one kind of drug may be inappropriate if criminal possession was included.

CHAIRMAN GROSFIELD added that the availability of tests which show traces of drugs that may have been taken several years before the test has raised uncertain scenarios regarding mandatory minimum sentences for any amount of a drug found in a body.

Jim Hutchison, Montana Crime Lab, remarked that hair analysis is still in its infancy and has not been challenged or tested in

federal or other state courts. Hair analysis will detect certain drugs which have been used over long periods of time. Blood samples are used to show impairment of a drug. At the time the sample is collected for a blood test, either the drug is there or it is not. Urine is a reservoir from other drugs that have already gone through the system. Drugs are detectible in urine for up to three weeks.

An issue that was raised is whether a breath test would detect drugs. **Mr. Hutchison** affirmed that it did not. It is only used for purposes of detecting alcohol in breath samples.

SEN. BARTLETT explained that one of the concerns they had on the bill regarding criminal possession was that it included any amount that was contained within your body. Someone who is driving and smoked a joint of marijuana a week ago may have residue still present in their body and it may show up in their urine. It would be hard to demonstrate that that had any impact on their driving ability at the time the test was taken.

Mr. Hutchison agreed. The tests used at the lab can detect very small quantities of most drugs, whether they be prescription or non-prescription. Since late 80's there have been concerns regarding passive inhalation from marijuana, methamphetamine, heroin, and cocaine. Studies have shown that those drugs will not be detected in the blood under very extreme circumstances except for children. He also was concerned about how drug detection would be used in court. He added that Montana needs an internal possession law.

CHAIRMAN GROSFIELD commented that marijuana and alcohol listed quantities in statute. Opiates would involve a mandatory minimum two year sentence for any amount. The sophistication of drug technology causes a concern regarding possession being internal possession of drugs.

Brenda Nordlund, Department of Justice, remarked that she has been working with the DUI Task Force for two sessions. When internal possession was discussed, there was a very brief discussion about the penalty clause. The attitude was that the legislature needed to determine whether the penalties were appropriate. She agreed that the penalty in Section 45-9-102 does not make sense as applied to internal possession. She suggested that the Committee decide on outer boundaries or revert to (5) on page 2, lines 1-3 of the second reading version of SB 158. Possession of dangerous drugs is not used that often anymore because if there is any quantity they will charge possession with an intent to sell. This has a higher range.

CHAIRMAN GROSFIELD stated that subsection (5) is current law. He believed there was too much potential for drugs showing up for a long time.

Ms. Nordlund suggested starting with a meager sentence such as misdemeanor up to one year. She added that it was important to see how internal possession was dealt with as a proof issue. The DUI Task Force would be comfortable with any version of a penalty structure.

CHAIRMAN GROSFIELD questioned whether some of the sophisticated tests could determine when the drug was taken. **Mr. Hutchinson** responded that this would depend on the drug. With some drugs they can come up with a rough idea about when the drug was ingested and the amount. On some drugs this cannot be determined.

SEN. HALLIGAN encouraged a penalty of no more than one year with discretion for judges so they would have the flexibility to deal with these cases.

Mr. Hutchinson added that they have limits of detection for most drugs in the lab. At levels below that, they do not report it out even if they see it. They have established standard curves for limit detection. He will not lower standards of detection for purposes of this bill. As Chief Toxicologist, that is his decision in the lab.

CHAIRMAN GROSFIELD asked where they were granted the flexibility to do so. The statute states "any amount". The department may need some specific authority to make sure they can do so.

SEN. BARTLETT asked why there were standards of detection. **Mr. Hutchinson** stated that there can be false peaks or signal to voice ratio. Guidelines are established that are accepted by the American Academy of Forensic Scientist that say that these are the recommended limits of detection or cutoff that should be followed. Federally mandated guidelines for urine drug testing establishes certain cutoff levels in urine. This is related to the performance of the instrumentation.

ADJOURNMENT

Adjournment: 12:10 P.M.

SEN. LORENTS GROSFIELD, Chairman

JUDY KEINTZ, Secretary

LG/JK

EXHIBIT (jus17aad)